BAUER (M) SDN BHD

v.

EMBASSY COURT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24NCC(ARB)-4-02-2012]
31 MARCH 2014

CIVIL PROCEDURE: *Judgments and orders - Appeal against order of Senior Assistant Registrar - Order made for hearing of application for examination of judgment debtor - Rules of Court 2012, O. 48 - Whether Senior Assistant Registrar empowered to make order for judgment - Whether 'trade receivables' and 'other receivables' could be ordered to be paid - Debtors Act 1957 s. 4(6)*

This appeal arose from the decision of the Senior Assistant Registrar ('SAR') in ordering the appellant ('the defendant') to pay to the respondent ('the plaintiff') a sum of RM8,389,068.12 ('the sum'), based on the defendant's financial statement. The order was made in respect of a hearing with regard to the plaintiff's application for examination of the judgment debtor pursuant to O. 48 of the Rules of Court 2012 ('ROC'). The defendant argued that (i) the SAR had erred in applying O. 48 r. 1 of the ROC as O. 48 is just an aid of execution by way of examination; (ii) there is nothing under O. 48 r. 1 of the ROC which allows the court to make an order to compel the defendant to make payment of a specified amount to the plaintiff; (iii) alternatively, the sum payable should not include 'trade receivables' and 'other receivables'; (iv) the SAR failed to consider that the financial statement for the year 2011 had net current liabilities of RM16,550,557 and net loss of RM19,909,057; and (v) that the order to pay the sum to the defendant was flawed and did not reflect the real financial position of the defendant. The issues that arose for the court's adjudication were: (i) whether the SAR was empowered to make an order for the judgment; and (ii) whether the 'trade receivables' and 'other receivables' could be ordered to be paid.

Held (dismissing appeal):

(1) The rules of court governing the Debtors Act 1957 ('the Act') are O. 48 and O. 74 of the ROC. Since the parties agreed that O. 74 of the ROC made no provision for the examination of the judgment debtor, the court has to fall back on O. 48

of the ROC which clearly provides for an examination of a judgment debtor which is a body corporate. Although O. 48 r. 1 of the ROC does not make provisions for the court to make any order upon examination, the court is empowered to do so by virtue of s. 4(6) of the Act which provides that the court can, upon examination of the judgment debtor, as to its ability of satisfying the judgment, make an order that the judgment debtor pay the judgment debt in the two modes provided. Therefore, the SAR's order was correct. (paras 12, 14, 15, 17, 18 & 19)

(2) There was no merit in the defendant's contention that the basis as to how the court arrived at the sum as the sum payable should not include 'trade receivables' and 'other receivables'. The defendant could not now argue that the financial statement for the year 2011 was not the current financial position of the defendant and was not outdated. The defendant had been specifically informed to produce the relevant document or books of accounts during the examination of the judgment debtor in order to determine the current financial position of the defendant. (paras 20 & 22)

Case(s) referred to:

Barefoot v. Clark [1949] 2 KB 97 ***(refd)***

Kertih Port Sdn Bhd v. Pemunya Kapal "Shema" [2011] 3 CLJ 184 HC ***(refd)***

Khoo Wai Keong Ronnie v. Hanam Andrew J [2003] SGMC 41 ***(refd)***

Nistrans (M) Sdn Bhd v. Golden Flower Farm Sdn Bhd [2011] 1 LNS 757 HC ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***

Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC ***(refd)***

Legislation referred to:

Debtors Act 1957, s. 4(1), (2), (3), (4), (5), (6)(a), (b)

Rules of Court 2012, O. 48 r. 1(2), O. 74 rr. 1, 2

For the plaintiff - K Gobinath (Adam Lee with him); M/s Kadir Andri & Partners

For the defendant - Ting Lee Ping; M/s Ringo Low & Assocs

Reported by Najib Tamby

JUDGMENT

Lau Bee Lan J:

[1] Enclosure 20 is an appeal of the appellant/defendant ('the defendant') against the decision of the learned Senior Assistant Registrar ('SAR') given on 20 September 2013 ('SAR's order of 20 September 2013') that the defendant pay the respondent/plaintiff ('the plaintiff') a sum of RM8,389,068.12 within 30 days from the date of the order with cost of RM1,000.

[2] The sum of RM8,389,068.12 is derived from the defendant's financial statement as at 31 December 2011 and the defendant's Malayan Banking Berhad account statement as at 9 April 2013 as follows:

Item/Description	Amount (RM)
Non-Current Asset	
(a) Property, plant and equipment	42,520.00
Current Asset	
(b) Trade receivables	8,302,261.00
(c) Other receivables	37,208.00
(d) Cash at bank	7,079.12
TOTAL	8,389,068.12

[3] The SAR's order of 20 September 2013 was made in respect of a hearing of encls. 8 and 10 which are similar in that it is with regard to the plaintiff's application for the examination of the judgment debtor pursuant to O. 48 Rules of Court 2012 ('RC 2012').

[4] Enclosure 8 relates to the examination of the judgment debtor through its officer, Dato' Mohamad Rizal bin Abdullah whilst encl. 10 is a mirror application except that it relates to the examination of the judgment debtor through its officer, Muhammad Izzat Zulfeka bin Mohd Mokhlas.

[5] Prior to the said applications being heard and the SAR's order of 20 September 2013 the plaintiff has an arbitral award against the defendant and is indebted to the plaintiff for a total sum of RM18,718,966.28.

[6] The gist of the defendant's appeal is premised on two grounds:

(a) whether the learned SAR is empowered to make an order for judgment; and

(b) whether the 'trade receivables' and 'other receivables' can be ordered to be paid.

[7] The defendant's contentions in brief are:

(i) The learned SAR has erred in applying O. 48 r. 1 RC 2012 whereby O. 48 is just a tool or an aid of execution by way of examination. Its main objective is to solicit information from the debtor for determining the appropriate mode of enforcement.

(ii) There is nothing under O. 48 r. 1 which allows the court to make an order to compel the defendant to make payment of a specified amount to the plaintiff.

(iii) Alternatively, the defendant submits that the sum payable should not include 'trade receivables' and 'other receivables' due to the following reasons:

(a) it is just the sum of money entitled to the defendant but the defendant has no actual possession of the money;

(b) the 'trade receivables' is defendant's future prospects of payment and should not be considered that the defendant has means to pay;

(c) the 'trade receivables' are balances which relate to refundable stakeholders sum due from purchasers from the sales of properties which are held in trust by the solicitor;

(d) as regards to 'other receivables', these are deposits paid for other purposes which defendant has no actual possession.

(iv) The learned SAR failed to consider that the financial statement for the year 2011 has net current liabilities of RM16,550,557 and net loss of RM19,909,057.

(v) The order to pay to the defendant an amount of RM8,389,068.12 is flawed and does not reflect the real financial position of the defendant.

[8] The plaintiff's contentions in brief are:

(i) No error made by the learned SAR whereby the amount calculated derived from 'trade receivables' and 'other receivables' had been admitted by the defendant's representatives.

(ii) Defendant's financial statement as at 31 December 2011 is not a current financial position of the defendant and as such is outdated.

(iii) Defendant failed to produce any other evidence contrary to the defendant's financial statement year 2011.

(iv) The court should not interfere the finding made by the SAR.

Findings

Whether The Court Is Empowered To Make An Order For Judgment

[9] Section 4(1) of the Debtors Act 1957 (Act 256) ('the Debtors Act') states:

> 4.(1) **Where the judgment of a court is for the recovery or payment of money** whether by instalments or otherwise the party entitled to enforce it (hereinafter called the judgment creditor) may, **subject to and in accordance with any rules of court**, summon the judgment debtor, *or if the judgment debtor is a corporation an officer of that corporation, to be orally examined before the court respecting the judgment debtor's ability to pay or satisfy the judgment debt*, and for the discovery of property applicable to such payment and to the disposal that the judgment debtor has made of such property.
> (emphasis added)

[10] From the aforesaid provision, it is clear that the plaintiff as the party which is entitled to enforce the judgment termed as a judgment creditor may seek for recovery of payment of money (RM18,718,966.28) by summoning an officer of the corporation since the judgment debtor in this case, the defendant is a corporation to be orally examined by the court regarding the judgment debtor's ability to pay or satisfy the judgment debt (RM18,718,966.28).

[11] What is significant here is that the procedure therein is "subject to and in accordance with rules of court".

[12] In my judgment the rules of court governing the Debtors Act is O. 74 and O. 48 of the Rules of Court 2012 ('RC 2012'). This is premised on r. 1 and r. 2 of O. 74 RC 2012 which state:

> 1. (1) These Rules apply to proceedings under the Debtors Act 1957 **subject to the following rules of this Order and the rules under Order 48 as may be applicable**.
>
> (2) In this Order:
>
> "the Act" means the Debtors Act 1957;
>
> "judgment" includes any order for the payment of money."

(emphasis added)

[13] From the aforesaid reading of O. 74 r. 1 RC 2012, in my view it is important to note that 'these Rules' meaning 'RC 2012' apply "to proceedings under the Debtors Act 1957" but it is subject to O. 74 and O. 48 RC 2012 as the case maybe as can be inferred from the phrase "as may be applicable".

[14] The parties are in agreement that O. 74 RC 2012 makes no provision for the examination of the judgment debtor. In fact this is the observation of the learned judge in the case of *Nistrans (M) Sdn Bhd v. Golden Flower Farm Sdn Bhd* [2011] 1 LNS 757; Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur Guaman Sivil No: D-22-910-2009 at p. 8 of the judgment (cited by the defendant).

[15] Therefore it is my humble judgment that the court has to fall back on O. 48 RC 2012 which clearly provides for an examination of a judgment debtor which is a body corporate. For convenience O. 48 r. 1 RC 2012 is reproduced:

> 1. Order for examination of judgment debtor. (O. 48, r. 1)
>
> (1) In this Order, "the Registrar" means the Registrar of the High Court or Sessions Court Judge or Magistrate.
>
> (2) Where a person has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), the Court may, on an application made *ex parte* by a notice of application supported by an affidavit in Form 95 by the person entitled to enforce the judgment or order,

order the judgment debtor, or, if the judgment debtor is a body corporate, an officer thereof, to attend before the Registrar, and be orally examined on the questions:

(a) whether any and, if so, what debt are owing to the judgment debtor; and

(b) whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order,

and the Court may also order the judgment debtor or officer to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination.

(3) An order under this rule shall be in Form 96 and must be served personally on the judgment debtor and on any officer of a body corporate ordered to attend for examination.

(4) Any difficulty arising in the course of an examination under this rule before the Registrar, including any dispute with respect to the obligation of the person being examined to answer any question put to him, may be referred to the Court and the Court may determine it or give such directions for determining it as it thinks fit.

[16] In fact the procedure under provision of O. 48 r. 1 RC 2012 is consistent with the procedure set out in sub-ss. (2), (3), (4) and (5) of s. 4 of the Debtors Act save that the Rules of Court have to be applied alongside s. 4 of the Debtors Act; for example as to the type of forms to be used, it is provided for in the Rules of Court (see for example O. 48 r. 1(2) RC 2012).

[17] Although O. 48 r. 1 RC 2012 does not make provision for the court to make any order upon examination, in my humble judgment, the court is empowered to do by virtue of sub-s. 6 of s. 4 of the Debtors Act. Section 4(6) of RC 2012 reads:

(6) **Upon such examination** or non-appearance as aforesaid **the court may order the judgment debtor to pay the judgment debt either**:

(a) **in one sum whether forthwith or within such period as the court may fix**; or

(b) by such instalments payable at such times as the court may fix.

(emphasis added)

[18] Pursuant to s. 4(6) of the Debtors Act, the court can upon examination of the judgment debtor as to its ability of satisfying the judgment, make an order that the judgment debtor pay the judgment debt in two modes provided under (a) or (b) above.

[19] In my judgment the SAR's order of 20 September 2013 that the defendant pay the plaintiff a sum of RM8,389,068.12 within 30 days from the date of the order with cost of RM1,000 is correct as he is empowered to do so by invoking s. 4(6)(a) of the Debtors Act after examination to order the defendant to pay the judgment debt in one sum "within such period as the court may fix".

Whether 'Trade Receivables' And 'Other Receivables' Can Be Ordered To Be Made

[20] I find there is no merit in the defendant's contention that the basis on how the court derived at RM8,389,068.12 as the sum payable should not include 'trade receivables' (RM8,302,261) and 'other receivables' (RM37,207,208) (see para. 2 above).

[21] During examination of the defendant's officers the following transpired from the evidence as per the plaintiff's submission:

> 10. The Defendant's Financial Statement as at 31.12.2011 clearly shows that the Property, plant and equipments are valued at RM42,520.00. This is also admitted by Dato' Rahadian during the Examination of Judgment Debtor.
>
> 11. The Defendant's Financial Statement as at 31.12.2011 clearly shows that the Trade receivables are valued at RM8,302,261. This is also admitted by Dato' Rahadian during the Examination of Judgment Debtor.
>
> 12. The Defendant's Financial Statement as at 31.12.2011 clearly shows that the Other receivables are valued at RM37,208.00. This is also admitted by Dato' Rahadian during the Examination of Judgment Debtor.
>
> 13. Dato' Rahadian had admitted in his "List of Questions and Answers for the Examination of Judgment Debtor" dated 15.5.2013, at question and answer no. 30, that the sum of RM7,079.12 is part of the assets of the Defendant as reflected in the Defendant's Malayan Banking Berhad Statement of Accounts. A copy of the Statement of Accounts dated 9.4.2013 was also produced and referred to during the Examination of Judgment Debtor.

[22] The defendant cannot now argue that the financial statement for the year 2011 is not the current financial position of the defendant and is not outdated. This is because the defendant had been specifically informed to produce the relevant documents or books of accounts during the course of the examination of the judgment debtor in order to determine the current financial position of the defendant.

[23] Under 'trade receivables', there is Note 5 which reads, *inter alia*:

> The Company's trade receivables of RM8,302,261 (2010: RM10,496,145) that are past due at the reporting date but not impaired are unsecured. These balances relate to refundable stakeholders sum due from purchasers from the sales of properties **which are held in trust by the solicitors**.
> (emphasis added)

[24] With respect, in my judgment it is the burden of the defendant to prove that the sum of RM8,302,261 has not been received by the defendant but it is "held in trust by the solicitors" as this is the position as at 31 December 2011 and not the current position as at 2013. However the defendant has failed to produce any evidence to the contrary.

[25] I note from the endorsement of the learned SAR on 20 September 2013 when the matter was fixed for clarification and decision of the judgment debtor summons, the learned SAR, *inter alia*, stated:

> CT : Seek clarification from P/D as to the evidence of financial statements year 2012.
>
> P/D unable to get answer from the company for the purpose of clarification.
>
> P/P : Cannot wait for all party to produce evidence, each and every time, should decide based on the available evidence. Wont have the current accounts. The Defendant can always file application to vary the order or put in further evidence when the evidence arises (if could produce 2012 financial statement).

[26] The defendant relied on the following passages from the cases of:

(a) *Khoo Wai Keong Ronnie v. Hanam Andrew J* [2003] SGMC 41 as follows:

> Company accounts must be properly interpreted and verified to attain an accurate reading of a company's financial situation.
>
> The Court on this summons can order the debtor to pay by instalments coupled with an order for committal to punish any default in payment. Before making this instalment order, the court must satisfied that the debtor has the means and ability to pay on the periodic terms ordered.

(b) *Barefoot v. Clark* [1949] 2 KB 97:

> Accordingly, before making a committal order it is essential (…) that the court should satisfied itself that, in respect of the sums for which the committal order is to issue, it can truly be said that since the respective due dates the debtor has had the means of paying them available, but has neglected to use those means for the purpose of paying them. It is obvious that the debtor's future prospects of payment have no bearing on this question.

[27] The principle in *Khoo Wai Keong Ronnie* (*supra*) is applicable as that is precisely what the court has to do during the examination process ie, to satisfy itself whether the judgment debtor has the means and ability to pay before making any order for the judgment debtor to pay in one lump sum forthwith or within a specified period fixed by the court or in instalments at the times fixed by the court according to s. 4(6)(a) or (b) of the Debtors Act respectively.

[28] As for the case of *Barefoot* (*supra*), the case can be distinguished as in the instant case, there is no evidence that the defendant has not received the amount of RM8,302,261 under 'trade receivables' for the reasons which I have alluded to in para. 20 to 25 above.

[29] I am mindful that this is an appeal and the court should be slow to disturb any findings of fact of the learned SAR. Here I share the views expressed by Nallini Pathmanathan J in *Kertih Port*

Sdn Bhd v. Pemunya Kapal "Shema" [2011] 3 CLJ 184, 190; [2010] 6 MLJ 88, 94 [12] that the learned registrar had the opportunity and advantage of seeing and reviewing first hand the credibility of the witnesses and rely on the cases of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1993] 2 CLJ 146; [1993] 1 MLJ 113 citing the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] MLJ 87; also *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337; [2006] 3 MLJ 131 cited by Her Ladyship in support thereof.

[30] In the circumstances, I find there are no merits in this appeal by the defendant which warrant this court to interfere with the SAR's order of 20 September 2013. Accordingly I dismissed the defendant's appeal with costs of RM4,000.